No. 18-272

IN THE

Supreme Court of the United States

JIM YOVINO,

Petitioner,

v.

AILEEN RIZO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] It represents 300,000 direct

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Chamber, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Both parties were timely notified more than 10 days

members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every geographic region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber routinely files amicus briefs in cases, such as this one, involving issues of national concern to business.

The Society for Human Resource Management (SHRM) is the world's largest HR professional society, representing 300,000 members in more than 165 countries. For nearly seven decades, the Society has been the leading provider of resources serving the needs of HR professionals and advancing the practice of human resource management. SHRM has more than 575 affiliated chapters within the United States. Since its founding, one of SHRM's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to the realities of the workplace.

Amici and their members have a strong interest in ensuring that the laws that govern hiring and compensation practices are fair, predictable, and uniformly interpreted. The court of appeals' decision deepens a circuit split regarding the viability of widely used and important employment practices that help both employers and employees. If left in place, the Ninth Circuit's judgment would not only exacerbate a glaring disuniformity in federal law but also have significant negative effects on hiring and compensation practices across the country.

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in advance of the Chamber's intent to file this brief and have consented to its filing.

SUMMARY OF THE ARGUMENT

The Equal Pay Act permits pay disparities based on "any * * * factor other than sex." 29 U.S.C. § 206(d)(1). In the opinion below, the Ninth Circuit, sitting *en banc*, held that prior salary is not a "factor other than sex," and, as a result, cannot permissibly be used to set salaries unless it results in identical pay across genders.

The question presented in this case is whether a widely used practice—one that has long been understood as justified for reasons that have nothing to do with sex—is now illegal. That question is of extraordinary significance. Employers large and small, in every region of the United States, have historically used prior salary as a metric to assess a range of matters, including the caliber and experience of applicants, the viability and competitiveness of their own compensation packages, and, ultimately, the fairness of the wages they pay to employees. By placing wage-history data off limits for employers within the nation's largest circuit, the court of appeals' rule exacerbates a clear, acknowledged split regarding the legal viability of that important practice.

The Ninth Circuit's tortured reading of the EPA's "catchall" defense also threatens the viability of a broad array of employment practices, such as individualized negotiation and competitive salary bidding, that include a reliance on prior pay. And, by depriving employers of the ability to rely on an objective measure of an applicant's market salary and legitimate expectations, the Ninth Circuit's rule encourages decisionmaking based on subjective factors—which is precisely what employment law generally seeks to avoid. Indeed, because subjective estimates of a market salary may tend to reflect

outdated or inaccurate information, the court of appeals' rule could lead to greater pay disparities, thus disadvantaging applicants—both female and male—who were particularly valued by their prior employers.

For these reasons, and those in the petition, the Court should grant certiorari.

REASONS FOR GRANTING CERTIORARI

I. THE DECISION BELOW DEEPENS A CIRCUIT SPLIT ON THE LEGALITY OF A WIDELY USED AND USEFUL EMPLOYMENT PRACTICE.

As the petition explains, the federal courts of appeals disagree sharply about the permissibility of using prior salary to set employee pay. The Ninth Circuit held that "it is impermissible to rely on prior salary to set initial wages." Pet. App. 27a. The Seventh and Eight Circuits, by contrast, have held that, absent some case-specific reason for skepticism, the use of prior pay is categorically acceptable. *See, e.g.*, *Wernsing* v. *Dep't of Human Servs.*, 427 F.3d 466, 468 (7th Cir. 2005); *Taylor* v. *White*, 321 F.3d 710, 717 (8th Cir. 2003). The Second and Sixth Circuits permit employers to rely on prior pay as long as they prove that such use is "rooted in legitimate business-related" concerns. *Aldrich* v. *Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525-27 (2d Cir. 1992); *see also, e.g.*, *Beck-Wilson* v. *Principi*, 441 F.3d 353, 365 (6th Cir. 2006). And the Tenth and Eleventh Circuits permit the use of prior pay only "as part of a mixed-motive" mode of setting salaries that relies on other factors as well. *Irby* v. *Bittick*, 44 F.3d 949, 955 (11th Cir. 1995);

see also, e.g., *Riser* v. *QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015).[2]

A. Reliance On Prior Pay Is Widespread And Legal In Most Jurisdictions.

That patchwork interpretation of federal law is intolerable for Amici's members, particularly given the widespread nature of the practice at issue. As the petition notes, a recent study showed that, in jurisdictions in which it is permitted, more than 60% of employers allow interviewers to ask about prior salary. Roy Maurer, Soc'y for Hum. Res. Mgmt., *Employers Split on Asking About Salary History* (Apr. 2, 2018) (https://tinyurl.com/ycrpcp42). Other studies confirm employers' widespread reliance on prior pay. One 2017 study found that 65% of executives believe their operations would be affected by a ban on questions about prior pay, such that if a nationwide ban were imposed, "hundreds of thousands of employers w[ould] need to modify their talent screening and hiring processes." Korn Ferry, *Korn Ferry Executive Survey: New Laws Forbidding Questions On Salary History Likely Change The Game For Most Employers* (Nov. 14, 2017) (https://tinyurl.com/y9gb4aru). Virtually none of those employers consider themselves "well prepared" to handle such a ban. *Id.*

As this case demonstrates, it is not just private employers that find it useful to ask about and rely on salary history when making decisions about recruitment, compensation, and retention. The

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[2] As the petition makes clear, the use of prior salary—like the use of any other factor—is impermissible in any circuit if invoked as a pretext for sex discrimination. *See, e.g.*, *Wernsing*, 427 F.3d at 469.

standard application for employment with the Judicial Branch of the United States requires applicants to list their starting and final salary at each job they held in the past ten years. *See* Federal Judicial Branch, *AO 78: Application for Employment* (www.uscourts.gov/sites/default/files/ao078.pdf); *cf.* 29 U.S.C. § 203(e)(2)(iii) (Equal Pay Act applies to Judicial Branch units with positions in the competitive service). The Judicial Branch's Pre-Employment Information form calls for even more data, including information about past retirement plans, the impact of cost-of-living adjustments on prior pay, and a variety of other specifics. *See* Federal Judicial Branch, United States Government, *AO 425: Pre-Employment Information* (www.uscourts.gov/sites/default/files/ao425.pdf).

Reliance on prior pay, moreover, is legal almost everywhere. A few jurisdictions, including California, Massachusetts, Oregon, Delaware, and the Cities of New York and Philadelphia, among a handful of others, have enacted legislation either barring employers from asking for job applicants' salary history or eliminating salary history as a justification for pay discrepancies. *See* Yuki Noguchi, Nat. Pub. Radio, *Proposals Aim to Combat Discrimination Based on Salary History* (May 30, 2017) (https://tinyurl.com/ya67hrua); *see also* Recent Legislation, *Oregon Bans Employers From Asking Job Applicants About Prior Salary*, 131 Harv. L. Rev. 1513, 1520 (2018). But most jurisdictions have left the practice of relying upon pay history undisturbed.

Some jurisdictions have even gone in the opposite direction from the Ninth Circuit: earlier this year, both Michigan and Wisconsin enacted laws *forbidding* localities to adopt salary-history bans and other

restrictions on the information employers can seek from applicants. *See* Mich. Comp. Laws § 123.1384(4) ("A local governmental body shall not adopt, enforce, or administer an ordinance, local policy, or local resolution regulating information an employer or potential employer must request, require, or exclude on an application for employment or during the interview process from an employee or a potential employee"); Wis. Stat. § 103.36(3)(a) (2018) ("No city, village, town, or county may enact or enforce an ordinance prohibiting an employer from soliciting information regarding the salary history of prospective employees.").

The vast majority of state and local jurisdictions therefore have declined to disturb the longstanding practice of relying on prior pay, despite having had ample opportunity to do so. Indeed, one can travel from Nevada to Pennsylvania without passing north of, south of, or through any state or municipality that has outlawed private employers' reliance on salary history. *See* Áine Cain, *et al.*, Bus. Insider, *9 Places In The US Where Job Candidates May Never Have to Answer the Dreaded Salary Question Again* (Apr. 10, 2018) (https://tinyurl.com/yc6odzs6); HRDive, *Salary History Bans: A Running List of States and Localities That Have Outlawed Pay History Questions* (Aug. 24, 2018) (https://tinyurl.com/y6urjl4x).

Moreover, there is reason to believe that the results noted above actually understate the impact of this case. Among the roughly one-third of employers that do not rely on salary history even in jurisdictions where it is permitted, many are "large[] * * * organization[s]" that have reacted to legal uncertainty by adopting companywide policies to comply with the strictest rules to which they are subject anywhere.

Maurer, *Employers Split on Asking About Salary History*, *supra*; *see also, e.g.*, Yuki Noguchi, Nat. Pub. Radio, *More Employers Avoid Legal Minefield By Not Asking About Pay History* (May 3, 2018) (citing survey finding that "46 percent of employers said they would adopt policies to comply with the strictest laws in their region") (https://tinyurl.com/y8d44oqk); HRDive, *Amazon Bans Salary History Inquiries* (Jan. 19, 2018) (quoting internal memorandum stating that Amazon took "a proactive stance" of banning salary-history questions in order to be "consistent for all candidates * * * in * * * the United States") (https://tinyurl.com/yajn5bhm). Those employers show up as false negatives in the surveys, because they would ask about prior pay if it were permissible in more jurisdictions. It is therefore likely that far more than two-thirds of employers in the United States would, if left to their own devices, ask about and rely upon information about prior pay. For these larger national employers, the Ninth Circuit's decision has consequences far beyond that Circuit's territorial borders.

For other employers of all sizes, the circuit split means that the legal standard varies depending on where they happen to be located. The vast majority of employers in the United States operate in jurisdictions in which reliance on salary history is entirely legal. An overwhelming percentage of American businesses operate locally, and therefore have no reason to comply with bans in the few coastal states that have enacted them. Of the 5.6 million employer firms in the United States, 99.7% are small businesses with fewer than 500 employees. Small Bus. & Entrepreneurship Council, *Facts & Data on Small Business and Entrepreneurship*

(https://tinyurl.com/yby8j54r). Those firms employ nearly half of all employed Americans. *Id.* Thus, while rules adopted in large states can exert an outsize influence on some large employers, tens of millions of American job-seekers and employees continue to live and work in jurisdictions in which reliance on salary history is both permitted and commonplace. They therefore operate under an entirely different federal-law regime with respect to the use of prior pay than their counterparts in the Ninth Circuit and the other circuits that have circumscribed the practice in lesser ways. The Court should grant certiorari to restore uniformity to the law.

B. Reliance On Prior Pay Is A Sex-Neutral Practice.

As the practice's widespread nature tends to suggest, many employers rely on prior salary for reasons having nothing to do with sex. For instance, in litigation over Philadelphia's attempt to legislate on this issue, the Chief Diversity Officer of a major media company that is one of the Nation's largest employers attested that his company "inquires about and relies on wage history for a number of legitimate reasons." [3] Those reasons include the need to "determine the market wage" for a given job and to evaluate "the level of responsibility the applicant had at his or her prior job."[4] He further attested that data about items such as prior bonus payouts and vested and unvested equity from a current employer are

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[3] Decl. of David L. Cohen ("Cohen Decl."), Comcast Corp., Dkt. 29-4, *Chamber of Commerce for Greater Phila.* v. *City of Phila*, No. 2:17-cv-01548-MSG, ¶ 8 (E.D. Pa. June 13, 2017).

[4] *Id.* ¶ 9(a)-(d).

critical to the company's ability to generate an appropriate compensation offer competitive with what the applicant might be "leaving behind."[5] Moreover, wage history can "signal[] the value that the candidate's prior employer placed on his or her work," which is particularly relevant for a sales- or commission-based job.[6]

In the same litigation, the Senior Vice President for Human Resources of a large hospital attested that his company's efforts to maintain "a diverse workforce" turn not only on effective recruitment—for which information about prior pay is vital—but also on effective retention.[7] As he testified, while "it is *essential* to know the total compensation package that [an] applicant currently receives * * * in order to make an attractive offer," information about each applicant's likely "starting point" in negotiations also provides the hospital "flexibility" to "reserve funds for promotions or other rewards for good work or longevity."[8] Without the "flexibility" provided by access to prior-pay information, the hospital fears, it "could see increased churn among its employees."[9]

Information about prior pay is also of great concern to smaller companies. Those companies are often unable to commission market compensation studies,

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[5] *Id.* ¶ 9(c).

[6] *Id.* ¶ 9(b).

[7] Decl. of Robert Croner ("Croner Decl."), the Children's Hospital of Philadelphia, Dkt. 29-5, ¶ 9(b), *Chamber of Commerce for Greater Phila.* v. *City of Phila*, No. 2:17-cv-01548-MSG (E.D. Pa. June 13, 2017) (emphasis added).

[8] *Id.* ¶ 8, 9(b) (emphasis added).

[9] *Id.* ¶ 9(b).

even though many of them operate in industries where high turnover rates require near-constant salary adjustments. For example, the owner of a small document management company testified in the Philadelphia litigation that "[o]ffering a premium" over prior pay is particularly "essential" to the hiring of professional truck drivers.[10] In that industry, the turnover rate can exceed 80%, as drivers routinely leave one organization for a higher-paying trucking job elsewhere.[11] To offer the raises that are critical to its recruiting efforts, the company "needs to know what a given driver is currently making so that it can adjust its salary offer accordingly."[12] The company "commonly will offer a premium on an applicant's previous or current compensation to show how valued that applicant is."[13]

Even if an employer cannot match a prior salary, prior-pay information conserves resources by streamlining the hiring process. Many employers ask about prior salary "not in order to discriminate," but because "[t]hey don't want to waste the time of a candidate who's seeking a higher salary than they can offer." Noguchi, *Proposals Aim to Combat Discrimination Based on Salary History*, *supra*. Wage-history questions save "significant time and resources" in the hiring process, for both applicants and employers, by enabling employers to determine whether an

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[10] Decl. of Keith DiMarino, Dkt. 29-7, ¶ 8, *Chamber of Commerce for Greater Phila.* v. *City of Phila*, No. 2:17-cv-01548-MSG (E.D. Pa. June 13, 2017).

[11] *Id.*

[12] *Id.*

[13] *Id.* ¶¶ 11(a)-(c).

applicant would be able to work within the salary guidelines of a given company.[14]

These are all legitimate reasons for inquiring about prior pay that have nothing to do with an applicant's sex. And the benefits associated with them accrue to both male and female employees. As shown by this case, where an employer has guaranteed a raise to every new employee, many employees will benefit from sharing their past salaries. In the Philadelphia case, one business owner testified that his company had recently offered to increase one candidate's bonus by 75% over that offered at the candidate's previous job, and offered another applicant a 30% premium over the prevailing market rate in light of her prior salary.[15] If employers were unable even to consider such data, applicants' ability to benefit from extraordinary performance in prior jobs would be sharply curtailed.

II. THE NINTH CIRCUIT'S RULE CALLS INTO QUESTION LEGITIMATE AND SEX-NEUTRAL EMPLOYMENT PRACTICES THAT RELY ON OBJECTIVE INFORMATION.

The court of appeals based its decision on the conclusion that, under the EPA's "catchall" defense, the only legitimate "factor[s] other than sex" are those that measure "work experience, ability, performance, or any other job-related quality." Pet. App. 12a, 25a. That rationale would not justify the Ninth Circuit's decision even on its own terms, given that prior pay is

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[14] Croner Decl. ¶ 9(a); *see also* Cohen Decl. ¶ 9 (information assesses whether an applicant would be willing to work within the "predetermined budget assigned to" each open position).

[15] *Id.* ¶¶ 11(c), 10(a).

plainly job-related and that prospective employers use it to measure an applicant's performance in prior jobs. *See supra* at 9-12. More fundamentally, the court's broad holding is contrary to the statute, which, by its plain text, permits an employer to invoke "*any* * * * factor other than sex" as a defense. 29 U.S.C. § 206(d)(1) (emphasis added); *cf. Republic of Iraq* v. *Beaty*, 556 U.S. 848, 856 (2009) ("Of course the word 'any' * * * has an expansive meaning."). Moreover, it threatens to invalidate, without any statutory warrant, many other employment practices that are equally as valuable and widely accepted as reliance on prior pay.

For example, it is extremely common for both applicants and employees to seek better pay by informing employers not only of past salaries, but of other offers available at the time of the negotiation. *See, e.g.*, Amy Gallo, Harv. Bus. Rev. Online, *Setting the Record Straight: Using an Outside Offer to Get a Raise* (July 5, 2016) (outside offers are "recognized as a legitimate way to get * * * higher compensation") (https://tinyurl.com/jhm2eub); *see also* Jen Hubley Luckwaldt, PayScale, *When Should You Use an Outside Offer to Negotiate Salary?* (July 11, 2016) (providing strategic advice for applicants) (https://tinyurl.com/ybsf6n3l). This strategy almost uniformly benefits prospective employees and the labor market more generally: by informing a current or prospective employer of alternative salary offers, applicants and employees hope to encourage matching or higher offers. The ability to bargain in that manner is a basic aspect of any market.

Under the court of appeals' reasoning, however, that practice may be suspect. There is no apparent reason why reliance on pay associated with *current* job offers

would be any more or less discriminatory than reliance on pay associated with *past* jobs. Moreover, if, as the Ninth Circuit held, the pay one earned in past positions is not related to "work experience, ability, performance, or [otherwise] job-related quality," *cf.* Pet. App. 12a, then the pay one has been offered for an alternative position would seem to be no different. The Ninth Circuit's opinion therefore poses a significant threat not just to reliance on prior pay, but to competitive salary bidding altogether.

In addition, although the Ninth Circuit purported to reserve the question whether past salary may play a role in individualized salary negotiations—as distinguished from petitioner's across-the-board pay scale—its decision threatens that practice as well. As Judges McKeown and Callahan explained in concurrences below, the court of appeals' rationale "makes it impermissible to rely on prior salary to set initial wages," and therefore, "[i]n the real world," leaves "little daylight for arguing that negotiated starting salaries should be treated differently than established pay scales." Pet. App. 36a (McKeown, J.), 49a n.10 (Callahan, J.) (noting that despite court of appeals' reservation, its "conclusion that past salary cannot be considered alone *or* in conjunction with less invidious factors" established a bright-line rule covering negotiations as well) (emphasis added). The Ninth Circuit's *ipse dixit* "disclaimer" regarding negotiations "hardly cushions" the logical effect of its ruling, which could be viewed as prohibiting reliance on prior salary in formal pay scales and salary negotiations alike. *Id.*

It is also not clear whether the Ninth Circuit's rule permits *any* negotiated salary differential, even where negotiations do not turn on the applicant's prior pay.

Some have argued, based on studies asserting that men and women differ in their propensity to negotiate, that pay differentials based on salary negotiations necessarily violate the Equal Pay Act. *See, e.g.*, Christine Elzer, *Wheeling, Dealing, and the Glass Ceiling: Why the Gender Difference in Salary Negotiation Is Not a "Factor Other Than Sex" Under the Equal Pay Act*, 10 Geo. J. Gender & L. 1, 33-35 (2009). Although no court has yet endorsed that conclusion, the Ninth Circuit's decision, which severely circumscribes the catchall defense, threatens to chill that commonplace practice as well.

Moreover, and setting aside particular pay practices, the Ninth Circuit's rule undermines the accepted understanding that, in making employment and compensation decisions, employers should strive whenever possible to rely on objective data. [16] Reliance on such data avoids even an appearance of implicit bias. Employers rely on wage history precisely because it is an objective, reliable indicator of a wide range of useful facts about a given applicant,

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[16] *See, e.g.*, Heather Huhman, Huffington Post, *5 Ways to Be Objective in Your Hiring Process* (May 7, 2013) ("Employers need to be objective when hiring new employees to ensure they provide equal opportunities for every job seeker who applies. By applying these ideas to your hiring process, you will be able to select a candidate with accuracy and fairness.") (https://tinyurl.com/y992lyq7); *see also* Toni Vranjes, Soc'y for Hum. Res. Mgmt., *Reduce the Legal Risks of Performance Reviews* (Feb. 19, 2016) ("Employers should strive to evaluate workers on objective factors, like meeting sales numbers or meeting project deadlines.") (https://tinyurl.com/y8f9et2u); Bus. Mgmt. Daily, *Use Objective Criteria—and Beware Subjective Judgment Calls—When Deciding Promotions* (Feb. 21, 2010) ("Nothing speeds a disappointed job-seeker's trip to court like a selection process based on an employer's use of subjective criteria.") (https://tinyurl.com/yatqaoj5).

including the value that a prior employer has placed on a particular employee and that employee's legitimate salary expectations. *See supra* at 9-12.

If employers are prohibited from inquiring about or relying on that objective information, they may rely on more subjective factors that would be imperfect substitutes for the banned data. One economist has opined that if employers "cared enough about [prior salary] to ask [about] it to begin with, they probably care about it enough to try to guess." Noam Scheiber, N.Y. Times, *If a Law Bars Asking Your Past Salary, Does It Help or Hurt?* (Feb. 16, 2018) (quoting Jennifer Doleac, an economist at the University of Virginia) (https://nyti.ms/2C1mmMX). Thus, some employers who are prohibited (or otherwise discouraged) from seeking useful, objective data about applicants may instead make guesses about what the data would be if it were available. *See* Fabiola Cineas, Philadelphia Mag., *Here's How the Wage Equity Law Kenney Just Signed Could Hurt Women* (Jan. 23, 2017) (https://tinyurl.com/ ybkrpkv5). That would not be surprising where pay is negotiated, since any party to a negotiation must make assumptions about the legitimate expectations of its counterparty. Thus, banning reliance on prior pay may encourage employers to rely on subjective estimates about an applicant's true expectations, rather than on objective data.

There is no reason to think those guesses will help alleviate pay disparities. To the contrary, if employers cannot rely on accurate and truthful information about what applicants have in fact been paid in the past, some may tend to rely instead on

outdated assumptions.[17] In doing so, they may underestimate applicants' prior pay, thereby leading to greater wage discrepancies than if accurate information were available. Indeed, precluding employers from learning about or relying on prior salary could particularly disadvantage applicants who are already well-paid by their current employers. *See* Recent Legislation, *supra* (discussing Oregon statute banning prior-pay defense, and noting that although it may help plaintiffs who bring claims, "its overall effect on wage setting is uncertain (and perhaps undesirable)"). It is likely for that reason that, even apart from the inefficiencies created by prior-pay bans, nearly two-thirds of executives in one recent study concluded that such bans would be ineffective in "actually improv[ing]" gender pay equity. *See Korn Ferry Survey*, *supra*.

This Court's review is warranted to ensure that, as Congress intended, *see Washington Cty.* v. *Gunther*, 452 U.S. 161, 170-71 (1981), the Equal Pay Act leaves in place legitimate compensation practices that are based on factors other than sex. The courts should not effectively amend the plain language of the statute where Congress, which is best equipped to assess the costs associated with a salary-history ban, has not seen fit to do so. Nor should this Court leave in place an entrenched and widely acknowledged circuit split on this critical issue of federal law.

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[17] Employers may rely in part on other business factors in setting an individual's pay. These include factors such as market competition, employer size, whether the employer is public or private, level of product demand, industry characteristics, value of each position to the organization, and competitors' pay rates.

CONCLUSION

For the foregoing reasons and those in the petition, the Court should grant the petition for certiorari and reverse the judgment below.

Respectfully submitted,

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